# BEFORE THE APPEALS BOARD FOR THE KANSAS DIVISION OF WORKERS COMPENSATION

JOHN KOTNOUR	)	
Claimant	)	
VS.	)	
	) D	ocket No. 1,038,809
CITY OF OVERLAND PARK	)	
Self-Insured Respondent	)	

## ORDER

Claimant appealed the January 9, 2009, Award entered by Administrative Law Judge Kenneth J. Hursh. The Workers Compensation Board heard oral argument on April 22, 2009.

# **A**PPEARANCES

James E. Martin of Overland Park, Kansas, appeared for claimant. Kip A. Kubin of Kansas City, Missouri, appeared for respondent.

## RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

#### Issues

The parties agreed claimant, who is a police officer, injured his right lower extremity on September 21, 2007, when he jumped from a four- to five-foot retaining wall while chasing a suspect. In the January 9, 2009, Award, Judge Hursh denied claimant's request for workers compensation benefits after finding that claimant failed to provide timely notice of his accidental injury.

Claimant maintains he provided notice of the injury to respondent on the 74th day following his accident. What is more, he argues that notice was timely as there was just cause to extend the notice period to 75 days as provided by K.S.A. 44-520. Claimant also argues the evidence is uncontradicted that he sustained an eight percent impairment to his right lower extremity. Finally, claimant requests the medical expenses that he incurred with Dr. Edward J. Prostic should be paid by respondent as authorized medical expense as

respondent failed to provide him medical treatment upon learning of his injury. In the alternative, claimant requests that respondent pay for his initial appointment with Dr. Prostic as unauthorized medical expense as provided by K.S.A. 44-510h. In short, claimant requests the Board to reverse the January 9, 2009, Award and grant him workers compensation benefits for his right lower extremity injuries.

Conversely, respondent argues the time for providing notice of claimant's injury was not extended from 10 to 75 days as claimant failed to prove there was just cause for failing to report his accident within 10 days of its occurrence. Accordingly, respondent requests the Board to affirm the January 9, 2009, Award.

The issues before the Board on this appeal are:

- 1. Did claimant provide respondent with timely notice of his accidental injury?
- 2. If so, what is the nature and extent of claimant's injury?
- 3. What is respondent's liability regarding the medical expense incurred with Dr. Prostic?

# **FINDINGS OF FACT**

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant has been employed by respondent as a police officer for more than 18 years. As indicated above, the parties agreed claimant injured his right lower extremity on September 21, 2007, while chasing a suspect. During the chase claimant jumped from a four- or five-foot retaining wall. Either later that evening or by the next morning claimant noticed a *twinge* in his right knee. But claimant did not think much about it. He testified in part:

Well, basically that next morning, later that evening or the next morning I had a twinge in the knee. I've had such things before and didn't really think a lot of it. A little pain. It kind of came and went but it continued. And I continued about my work and after a period of time, I noticed it was getting difficult to stand for long extended periods of time.<sup>1</sup>

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<sup>&</sup>lt;sup>1</sup> R.H. Trans. at 7.

Claimant did not report the incident to a supervisor until December 4, 2007, which was immediately after he had been told by his personal physician to report his injury to his employer. Claimant explained:

- Q. (Mr. Martin) And when you noticed this twinge in your knee, did you report it as an accident?
- A. (Claimant) I did not.
- Q. Why not?
- A. I didn't really think of it as an injury.
- Q. What do you think of as an injury?
- A. Well, I wasn't debilitated. For me it was an issue of, can I continue doing my work. Is it bad enough to keep me at home. Is it going to go away.
- Q. Have you had the same or similar incidents to other parts of your body?
- A. Yeah. I mean, I've sprained a wrist, I've twisted ankles and things like that, and usually in a couple weeks they go away.
- Q. Do you turn those in to workers' compensation?
- A. No.<sup>2</sup>

. . . .

- Q. And I think you previously told us but so we make sure we understand, what did you understand was an injury?
- A. Something that prevented me from doing my job.
- Q. And this wasn't preventing you from doing your job?
- A. I hadn't missed any work, no.
- Q. And you still haven't missed any work?

<sup>&</sup>lt;sup>2</sup> *Id.* at 7. 8.

A. No.<sup>3</sup>

After claimant reported the incident to his supervisor on December 4, 2007, and was denied medical treatment, claimant obtained legal counsel. Claimant's attorney initially sent claimant to Dr. Edward J. Prostic for an opinion regarding treatment. The doctor examined claimant in February 2008 and diagnosed effusion (extra fluid) and subluxation of the patella in the right knee. The doctor believed it was also likely claimant sustained a bone bruise of the medial or lateral plateau in the right knee in the accident. Dr. Prostic opined that claimant was not yet at maximum medical improvement. The doctor recommended spinning exercises on a stationary bicycle and, if claimant's symptoms failed to improve, an MRI. For that examination and x-rays of claimant's knee, the doctor charged \$463.

In early May 2008 claimant saw Dr. Prostic for a second examination and an impairment rating. Dr. Prostic's final diagnosis was that claimant continued to have evidence of patellofemoral dysfunction and of plantar fasciitis. Using the AMA *Guides*,<sup>4</sup> the doctor rated claimant as having a seven percent impairment to the right lower extremity for the patellar problem and a one percent impairment for plantar fasciitis, a condition which claimant experienced before the September 2007 incident.

The Board finds claimant injured his right knee in September 2007 when he jumped from a retaining wall while chasing a suspect. Dr. Prostic's ratings are the only functional impairment ratings in the record. There is no reason to believe that Dr. Prostic's opinions are not credible or untrustworthy. Accordingly, the Board finds claimant sustained a seven percent impairment to his right lower extremity due to his accident at work.

The Board, however, finds that claimant has failed to prove his accident caused him any additional impairment due to his plantar fasciitis. Indeed, in his brief to the Board claimant indicated his "plantar fasciitis . . . was unrelated to the condition for which this claim was filed." 6

<sup>&</sup>lt;sup>3</sup> *Id.* at 12. 13.

<sup>&</sup>lt;sup>4</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>&</sup>lt;sup>5</sup> The Board finds no unauthorized medical benefits were used to obtain Dr. Prostic's rating opinions. Therefore, K.S.A. 2007 Supp. 44-510h(b)(2) does not exclude the doctor's opinions from the record.

<sup>&</sup>lt;sup>6</sup> Claimant's Brief at 2 (filed Feb. 18, 2009).

# Conclusions of Law

The Workers Compensation Act requires injured workers to report their accident to their employers within 10 days of when the accident occurs. But that 10-day period is extended to 75 days when there is *just cause*. K.S.A. 44-520 provides:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident . . . .

Claimant did not notify respondent of his accident or injury until December 4, 2007, which was 74 days after the accident.

Respondent argues that claimant's notice was untimely and, therefore, this claim is barred. Conversely, claimant argues the nature of both his accident and resulting injuries give credence to his argument there was just cause for failing to initially report an accident to respondent. Claimant, in essence, argues his symptoms were initially relatively innocuous and he, therefore, was initially unaware that he may have injured himself. In short, he did not associate the twinge he eventually developed in his knee with an accident or an injury that should be reported and he expected the symptoms to resolve. As could be expected, claimant was not familiar with the definitions of accident and injury as used in the Workers Compensation Act. And claimant did not consider himself injured as he was not prevented from doing his job.

Even when claimant saw his personal physician in early December 2007 and was told to report his knee complaints to his employer, the primary purpose of that appointment was claimant's plantar fasciitis and seasonal allergies. Claimant testified, as follows:

- Q. (Mr. Martin) What happened between September 21 and December 4? First of all, how did you get along?
- A. (Claimant) Well, I mean, I continued to do my job. I didn't have anything quite as serious as jumping off walls but it just became an issue of noticing continued

pain standing extended periods of time. So I was starting to avoid some of those things, running or anything strenuous. It just continued but I continued to do my job.

- Q. Were there days where you didn't have any symptoms?
- A. I wouldn't say there were -- it came and went, severity, depending on how long I might be standing on it, things like that, but it continued.
- Q. During that period of time did you still think it was just going to go away?
- A. Yeah, I did.
- Q. Now, eventually you went to a doctor, did you not?
- A. I did.
- Q. And what doctor was that?
- A. I just went to my personal physician.
- Q. Did you go because of this or did you go for some other reason?
- A. No. I went -- I had some plantar fascitis and I think I was in there for seasonal allergies and I mentioned it to him.<sup>7</sup>

The Board finds claimant's testimony is credible as claimant immediately notified respondent of his right knee problems when his personal physician advised him that he had probably sustained a work-related injury. Accordingly, the Board finds that claimant has established there was just cause to extend the period for notifying respondent of the September 2007 incident to 75 days. In conclusion, claimant provided respondent with timely notice.

The Workers Compensation Act also provides that injured workers may seek medical treatment at the employer's cost when the employer fails to provide such treatment. The Act provides, in part:

If the employer has knowledge of the injury and refuses or neglects to reasonably provide the services of a health care provider required by this act, the employee may provide the same for such employee, and the employer shall be liable for such expenses subject to the regulations adopted by the director.<sup>8</sup>

<sup>&</sup>lt;sup>7</sup> R.H. Trans. at 8. 9.

<sup>&</sup>lt;sup>8</sup> K.S.A. 44-510j(h).

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The evidence is uncontradicted that respondent failed to provide claimant with medical treatment after he reported the injury and requested medical treatment. Accordingly, the above-quoted statute entitles claimant to the payment of Dr. Prostic's charges for the February 2008 examination and treatment recommendations rendered claimant the same as authorized medical treatment; subject, of course, to the Director's fee schedule.

In conclusion, the January 9, 2009, Award should be reversed as claimant is entitled to receive both permanent disability benefits under K.S.A. 44-510d for a seven percent impairment to his right lower extremity and payment of the medical charges he incurred with Dr. Prostic in February 2008 the same as authorized medical treatment in such amount as is allowed by the fee schedule.

### AWARD

**WHEREFORE**, the Board reverses the January 9, 2009, Award and grants claimant benefits for a seven percent functional impairment to his right lower extremity.

John Kotnour is granted compensation from the City of Overland Park for a September 21, 2007, accident and resulting disability. Mr. Kotnour is entitled to receive 14 weeks of permanent partial disability benefits at \$510 per week, or \$7,140, for a seven percent permanent partial disability, making a total award of \$7,140, which is all due and owing less any amounts previously paid.

Claimant is entitled to payment of Dr. Edward J. Prostic's charges for the February 2008 examination and treatment recommendations rendered claimant the same as authorized medical treatment; subject, of course, to the Director's fee schedule.

Additional medical benefits may be considered upon proper application to the Director.

The record contains a fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires the written contract between the employee and the attorney be filed with the Director for review and approval. Accordingly, under K.S.A. 44-536(b), claimant's attorney will be entitled to such fee as may be approved by the Judge or Director.

The Board adopts the order assessing administrative costs set forth in the Award.

IT IS SO ORDERED.

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## DISSENT

We respectfully disagree with the majority opinion. There is no dispute that claimant was aware that he had suffered a discrete traumatic injury and that he did not report that specific injury within 10 days as required by statute.

Therefore, claimant relies upon the provision in K.S.A. 44-520 that permits time for giving notice to be extended to 75 days from the date of accident if claimant's failure to notify respondent within 10 days was due to just cause. In considering whether just cause exists, the Board has listed several factors which must be considered:

- (1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually.
- (2) Whether the employee is aware he or she has sustained an accident or an injury on the job.
- (3) The nature and history of claimant's symptoms.
- (4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident and whether the respondent had posted notice as required by K.A.R. 51-12-2(a).

As noted, there is no dispute the accident on September 21, 2007, was a specific traumatic event. There is also no question but that claimant was aware he had injured his right knee and that the injury was directly attributable to his employment.

The only explanation presented regarding claimant's failure to report the accident is that he thought the injury was temporary and would resolve. Claimant had suffered prior incidents while working for respondent which had been temporary and which he had decided not to report. Nevertheless, claimant admits he was aware of respondent's policy to immediately report all work-related injuries and he did not need a poster to tell him that.

This is not a case where claimant suffered repetitive traumas which a layperson understandably might not recognize constitutes an accident. Nor is it a case where claimant was unaware that his condition was work-related until a physician later tells him. This is a case where the claimant told the doctor that the injury occurred at work.

The undersigned agree that the 10-day notice requirement punishes the unwary employee who thinks that an ache or pain will improve. However, the majority decision in this case eliminates the 10-day notice requirement and extends it to 75 days in every case where the claimant simply asserts, "I thought it would get better". While extending the 10-day notice requirement to 75 days would be a less draconian notice requirement, nonetheless, that public policy determination should be left to the legislature.

The undersigned would find claimant has failed to prove that there exists just cause to extend the time for giving notice to 75 days and would affirm the ALJ's Award.

BOARD MEMBER	
BOTTO MEMBER	
BOARD MEMBER	

c: James E. Martin, Attorney for Claimant Kip A. Kubin, Attorney for Respondent Kenneth J. Hursh, Administrative Law Judge